

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1021,

Charging Party,

v.

CITY OF FREMONT,

Respondent.

Case No. SF-CE-1028-M

PERB Order No. IR-57-M

October 25, 2013

Appearances: Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr. and Kerianne R. Steele, Attorneys, for Service Employees International Union Local 1021; Liebert Cassidy Whitmore by Adrianna E. Guzman and Debra Margolis, Assistant City Attorneys, for City of Fremont.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on a Request for Injunctive Relief (IR Request) filed on April 5, 2013, by the Service Employees International Union, Local 1021 (SEIU) against the City of Fremont (City). SEIU's IR Request and supporting first amended charge allege that the City violated the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32603² by: (1) improperly processing a decertification petition; (2) failing to arrange for a neutral third party to conduct the decertification election; (3) unlawfully assisting the "decertification petitioner" by providing legal advice; (4) refusing to recognize SEIU as the exclusive representative of the bargaining unit, refusing to bargain with SEIU, and unlawfully withholding agency fees and

¹ MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

member dues payable to SEIU; and (5) violating its duty of neutrality by expressing its support for one of the now two competing employee organizations.

PERB's authority to seek injunctive relief under the MMBA is stated in section 3509(a), which incorporates the Board's authority under section 3541.3(j)³ of the Educational Employment Relations Act (EERA)⁴ to seek temporary relief or a restraining order. Injunctive relief is appropriate where: (1) there is "reasonable cause" to believe that an unfair practice has been committed, and (2) the injunctive relief sought is "just and proper." (*Public Employment Relations Bd. v. Modesto City Schools Distr.* (1982) 136 Cal.App.3d 881, 895 (*Modesto*); *San Ramon Valley Unified School District* (1984) PERB Order No. IR-46 (*San Ramon*).)

PROCEDURAL HISTORY

SEIU filed its unfair practice charge on January 29, 2013. The City responded with a position statement on February 28, 2013. On April 5, 2013, SEIU filed an amended charge and the instant IR Request.

Pursuant to PERB Regulations 32455, 32460 and 32465, the Office of the General Counsel investigated SEIU's IR Request, as well as SEIU's initial and amended charge.⁵ On

³ Section 3541.3(j) provides, in pertinent part:

To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

⁴ EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

⁵ The Office of the General Counsel reviewed and weighed SEIU's charge allegations, and its declarations on personal knowledge of all pertinent facts underlying the IR Request, as well as the City's position statement and declarations on personal knowledge in opposition to

April 13, 2013, the Office of the General Counsel made a recommendation to the Board itself regarding disposition of the IR Request.⁶ Upon receiving and considering the General Counsel's recommendation, the Board itself determined to grant SEIU's IR Request, and directed the Office of the General Counsel to seek appropriate injunctive relief. Thereafter, on May 1, 2013, the Office of the General Counsel commenced an action for injunctive relief against the City in Alameda County Superior Court.

We issue our decision on SEIU's IR Request to explain why we granted the request. Our decision on the IR Request, made in late April 2013, was based on the facts developed in the investigation conducted by the Office of the General Counsel. We did not consider, and could not have considered, evidence submitted at the formal hearing conducted in June 2013, by PERB's ALJ and summarized by the ALJ in her recently-issued proposed decision. Under the Board's procedures, the parties may appeal to the Board itself the ALJ's factual findings and legal conclusions, and if the parties do so, a final decision in this matter will be made in due course by the Board itself. (PERB Regs. 32300 – 32325.)

FACTUAL BASIS FOR THE DECISION

As noted above, PERB's Office of the General Counsel investigated the unfair practice charges and the IR Request in this matter. The investigation developed the factual basis upon which we rely in this decision. (*San Ramon, supra*, PERB Order No. IR-46.) We organize our factual discussion as follows: the City's local employer-employee relations rules, memorandum of understanding (MOU) recognition provisions and affiliation-related

the charge and the IR Request. The General Counsel also contacted the parties directly for further information and clarification, as deemed necessary to the investigation.

⁶ Also, on April 15, 2013, the Office of the General Counsel issued a complaint on SEIU's charge, and noticed an expedited informal settlement conference. Thereafter, the parties participated in an expedited hearing. On or about September 4, 2013, PERB's administrative law judge (ALJ) issued her proposed decision.

correspondence, the petition for decertification and the City's processing and approval of the petition, the City's initial withdrawal of recognition from SEIU, Craig D. Conwright's (Conwright) disaffiliation efforts, the City's cessation of dues and fees transmittals to SEIU, the City's acceptance of the disaffiliation election results and continuing refusal to bargain with or transmit dues and fees to SEIU.

The City's Local Employer-Employee Relations Rules and Regulations

Pursuant to the MMBA, in September 2001, the City adopted local Employer-Employee Relations Rules and Regulations (EERRR). The EERRR contains a procedure for formal recognition of an employee organization that represents a majority of City employees in an appropriate bargaining unit for purposes of meeting and conferring as required by the MMBA.

The EERRR includes as well a procedure for decertification of a formally recognized employee organization based on a petition that may be filed by an employee, a group of employees, or an employee organization, but only during November of any given year. The decertification petition must include the name of the formally recognized employee organization, must be verified under oath by the person signing the petition, and must be accompanied by written proof that at least 30 percent of the employees in the bargaining unit no longer wish to be represented by the formally recognized employee organization. If a valid decertification petition is filed, the City must arrange for a secret ballot election to determine if the formally recognized employee organization will retain its recognition rights.

Unlike PERB's own procedures (PERB Reg. 61300), the City's EERRR contains no procedure for amendment of certification.

MOU Recognition Provisions and Affiliation-Related Correspondence

From 1968 to December 1976, the various MOUs identified the exclusive representative as the Fremont Association of City Employees (also known as FACE). It appears that the MOUs for these years did not contain a recognition clause. Instead, FACE is identified in the first section of the MOU entitled “Parties to Understanding.”

On May 4, 1976, then-President of FACE Douglas Ward (Ward) sent a letter to the City’s Employee Relations Officer stating:

The F.A.C.E. Board of Directors have decided to initiate an election in regards to either affiliating or not affiliating with United Public Employees Union, Local 390, AFL-CIO. . . . [¶] . . . I want to emphasize that this election is in regards to possible affiliation for the purposes of meet and confer representation and not a decertification of F.A.C.E. F.A.C.E. will continue as a recognized employee unit in its present structure regardless of the election outcome.

On May 24, 1976, Ward sent another letter to the City, stating that employees had voted in favor of affiliation, with the following effect: “Therefore, effective immediately, [United Public Employees Union] Local 390 will represent F.A.C.E. employees for the purposes of negotiation in the meet and confer process and in all other employee matters on a day-to-day basis.” Ward identified the representative for Local 390 and asked for a meeting to discuss the relationship of the parties going forward.

On December 20, 1978, then-President of FACE Leonard Hernandez (Hernandez) and United Public Employees Union, Local 390 Executive Secretary Paul Varacalli (Varacalli) jointly sent a letter to the City. This letter states:

As per our conversation of December 6, 1978, we confirm that should F.A.C.E. in the future disaffiliate from Local 390 the F.A.C.E. President would so advise the City in writing. Said notification would cause the rescission of the May 24, 1967 letter from then President Ward advising of the affiliation.

Should such a disaffiliation occur under appropriate, and proper procedures, formal recognition as initially granted by the City would remain with F.A.C.E. Should UPE Local 390 terminate affiliation under appropriate, [sic] and proper procedures formal recognition would there after revert to F.A.C.E.

Further official correspondence from the City to FACE/390 should be addressed to the President of FACE/390, with a copy to the assigned Business Representative.

(Emphasis added.)

Since 1976, no employees have signed authorization cards to become members of “FACE.” Between 1976 and 1983, employees who wanted to become dues-paying members signed a card stating that they wanted to “be a member of the United Public Employees Local 390.” Throughout that period, the City deducted dues or agency fees from employees’ pay and transmitted the money to United Public Employees Local 390.

The MOUs covering the period from January 1977 to June 1984, contain a recognition clause which states that the City recognizes the “Fremont Association of City Employees/United Public Employees, Local 390” as the exclusive representative.

From May 1976 until March 2007, SEIU’s predecessors in interest – including United Public Employees Union, Local 390, AFL-CIO; United Public Employees Union, Local 390/490, Service Employees International Union, AFL-CIO; United Public Employees Local 790, Service Employees International Union, AFL-CIO; and Service Employees International Union, Local 790, AFL-CIO – were recognized in an unbroken series of MOUs and functioned in the role of exclusive representatives of the City’s general bargaining unit. Likewise, from May 1976 to March 2007, pursuant to applicable MOUs, the City deducted union dues or agency fees from the pay of employees in the general bargaining unit and transmitted these monies to SEIU’s predecessors in interest.

In March 2007, SEIU Local 790 merged with nine other locals to become SEIU 1021. On February 6, 2007, SEIU Local 790 Staff Director Larry Hendel sent a letter to City Human Resources Manager Nancy Carlson, notifying her that SEIU Local 790 was “an affiliate” of SEIU, and, based upon a reorganization, City employees formerly represented by SEIU Local 790 would be represented by SEIU Local 1021 effective March 1, 2007.

On June 12, 2007, counsel for SEIU wrote a letter to Kathy Ito (Ito) of the City Labor Relations Department “for the purpose of securing recognition by the City of Fremont of SEIU Local 1021 as the successor collective bargaining representative of all those City of Fremont employees currently represented by SEIU Local 790.” The letter asserted that “no question concerning representation is raised by mergers or affiliation of existing bargaining representatives, as long as basic due process has been provided to the members of the affected organization and there is some continuity of representation.”

On August 23, 2007, SEIU President Damita Davis-Howard sent a second letter to Ito stating that, as a result of the reorganization, the City of Fremont employees were now represented by SEIU. The City did not object and began to bargain with, transmit dues and fees to, and otherwise recognize SEIU as the exclusive representative of bargaining unit members.

Since 2007, SEIU and the City have been parties to three successive MOUs, with the following terms: July 2007 to June 2009; June 2009 to June 2011; and July 2011 to June 2013. From March 2007 until March 7, 2013, pursuant to MOUs between the City and SEIU, the City has deducted union dues or agency fees from the pay of employees in the general bargaining unit and transmitted these monies to SEIU.⁷

⁷ SEIU provided two redacted membership authorization forms signed on September 5, 2007 and January 7, 2013. These identify “Local 1021 Service Employees International

The Petition for Decertification and the City's Processing and Approval of the Petition

On November 29, 2012, the City received a decertification petition from City employee and general bargaining unit member Conwright, seeking to decertify “SEIU Local 1021” as the “formally recognized employee organization” then representing the general bargaining unit. Attached to the petition was proof of support of at least 30 percent of the unit.

On January 9, 2013, the City informed Conwright that the petition had not been properly verified as required by the EERRR, and asked him to submit verification. On January 10, 2013, Conwright provided verification.

On January 15, 2013, SEIU, through its attorney Kerianne Steele (Steele), objected to the decertification petition and election on the following basis: (1) the required verification had not been provided during the November 2012 window period for filing a decertification petition; and (2) a neutral third party—not the City itself—should conduct the election since the City proposed that the option of “no representation” would appear on the ballot.

On January 17, 2013, the City notified Conwright that the decertification petition was complete and that it conformed to the provisions of the EERRR, including the requirement that it be timely filed during the November “window period.” The City also determined that the proof of support was sufficient, and stated that it would, itself, conduct an on-site election on January 29, 30, and 31, 2013, “to determine whether or not SEIU shall retain its recognition rights.”

On January 22, 2013, Steele wrote to Deputy City Attorney Debra Margolis (Margolis) a letter confirming discussion between counsel in which the City had agreed to vacate the election dates and arrange for a neutral party, such as the State Mediation and Conciliation Service, to conduct the election. On January 24, 2013, Margolis wrote back to Steele, stating

Union” and “SEIU Local 1021” respectively, as the exclusive representative and the entity authorized to receive dues and fees pursuant to an agreement with the City.

that the City would do its best to have a neutral party conduct the election, but that she could not guarantee it would do so. Margolis also provided the City's position regarding language for the ballot. In further correspondence on January 23 and 25, 2013, Steele continued to object to the City's plan to conduct the decertification election sought by Conwright.

On January 29, 2013, SEIU filed its initial unfair practice charge in this matter, contending the City had violated the MMBA and PERB regulations in its handling and approval of Conwright's decertification petition.

The City's Initial Withdrawal of Recognition from SEIU

On February 1, 2013, the City's Human Resources Manager Alan DeMers (DeMers) wrote to Steele and "FACE President" Sue Byrne (Byrne), stating that the City had reviewed all of its MOUs covering the general bargaining unit from 1969 to the present, as well as some correspondence from when FACE first affiliated with one of SEIU's predecessors in interest in May 1976, and had concluded that "the decertification procedures of the [EERRR] are not applicable and that the appropriate procedure is for FACE to disaffiliate from SEIU using its own internal procedures." DeMers provided a detailed legal analysis about the difference between decertification and disaffiliation, including citations to PERB legal authorities, and sent Conwright a copy of this letter.

In his February 1, 2013, letter to Steele and Byrne, DeMers asserted further that the City's MOUs for the general bargaining unit "clearly demonstrate" that another entity, FACE, was at all times since its incorporation in 1969 the "designated exclusive bargaining representative" of the general bargaining unit, notwithstanding that recognition clauses in each of the MOUs from 1977 to the present, identified the exclusive bargaining representative as FACE combined with or affiliated with SEIU or one of its various predecessors in interest. DeMers stated, in addition:

We have found nothing in the City records to indicate that the outside local union [SEIU] was ever designated as the exclusive bargaining representative of the employees in FACE or that the outside local union was regarded by the City and by FACE as anything more than an 'affiliate' of FACE.

On February 8, 2013, DeMers sent a further letter to SEIU, responding to an unrelated matter and reiterating that SEIU was not the exclusive bargaining representative of employees in the general bargaining unit. DeMers stated as follows:

Also, your letter indicates that Service Employees International Union, Local 1021 ("SEIU") is the "exclusive representative of employees in the SEIU bargaining unit." As explained more thoroughly in my letter dated February 1, 2013, the City has recognized the Fremont Association of City Employees ("FACE") as the exclusive representative. Because FACE has chosen to affiliate with SEIU, we acknowledge SEIU's status as an affiliate and representative of FACE, but we do not agree that SEIU is the "exclusive representative" of the employees in this bargaining unit.

On March 6, 2013, despite the City's statements questioning SEIU's status as exclusive representative of employees in the general bargaining unit, SEIU Representative Seneca Scott sent the City a written request to begin bargaining for a successor MOU, stating, "SEIU [L]ocal 1021, which as you know is 'affiliated with the Fremont Association of City Employees' hereby requests to modify the existing Memorandum of Understanding once it expires on June 30, 2013."

Conwright's Disaffiliation Efforts

On or about March 8, 2013, Conwright and some other employees in the general bargaining unit circulated to their co-workers a notice of an election to decide as a group to either disaffiliate from SEIU or to remain affiliated with SEIU. The notice did not identify who had called for the election, who sponsored it, who would oversee it, or what rules would govern it. Neither Conwright nor employee and general bargaining unit member Ruby Wun, who distributed the notice via e-mail message, held leadership positions with SEIU or with

FACE. The election notice stated that in-person balloting would occur at four locations in City office buildings on March 12, 13, 14 and 19, 2013, with a ballot count to be held on March 20, 2013. The notice stated that all members of the general bargaining unit would be eligible, regardless of their status as dues-paying members or agency fee payers.

Also on March 8, 2013, Steele, on behalf of SEIU, wrote to Margolis and Senior Deputy City Attorney Nellie Ancel (Ancel), advising that: (1) a small group of employees had organized a disaffiliation election, and that there were no rules governing the election, such as what the ballot would say or what number of votes is necessary to determine the outcome; (2) the democratically elected officers of FACE had not called for this election; (3) no neutral party was overseeing the election; and (4) regardless of the outcome, the City would continue to have a duty to bargain with SEIU.

Conwright conducted the “disaffiliation election” as scheduled, and ballots were collected on March 12, 13, 14 and 19, 2013. Conwright and Police Department employees “supervised” the election. Non-dues-paying members of the general bargaining unit were encouraged to vote, and did vote, in the election. SEIU bylaws authorize only regular, full dues-paying union members to vote in internal union elections.

On March 20, 2013, Conwright sent an e-mail message to DeMers and another City Manager Brian Stott (Stott), with copies to FACE Board Members Byrne, Michael Lydon (Lydon), Shannan Young (Young), and Terence Wong (Wong). In that message, Conwright described himself as “the Petitioner of the FACE membership effort to conduct a SEIU Local 1021 disaffiliation election,” and reported that the ballot count for the disaffiliation election had been conducted that day, in the presence of FACE members, and two FACE board members. Conwright further reported that 145 FACE members had cast a ballot, and 83 had

voted “YES” in favor of FACE disaffiliation with SEIU, 61 had voted “NO” and one ballot was void. Conwright further asserted that:

As supported by the above tally, FACE members have voted to disaffiliate from SEIU Local 1021, and seek affiliation with a new labor bargaining representative (to be determined by FACE membership) prior to engaging in negotiations with the City of Fremont for a new Memorandum of Understanding (MOU) with an effective date of July 1, 2013.

Conwright closed by saying that “FACE membership respectfully request City of Fremont accept the results of the FACE election voting ‘Yes’ to disaffiliate from SEIU Local 1021.”

The City’s Cessation of Dues and Fees Transmittals to SEIU

On March 21, 2013, DeMers sent an e-mail message addressed to “Fremont Association of City Employees Board members” Byrne, Lydon, and Young, asking if they, “in [their] capacity as the FACE board,” recognized the results of the disaffiliation election. DeMers’s stated that disaffiliation was an internal union matter, but that the City wanted to begin bargaining and needed the FACE board to identify its bargaining team. DeMers further stated: “The City requires your response to this election in order to understand SEIU’s role in the upcoming bargaining process.” The message was copied to Conwright and to Stott.

Less than an hour after receiving DeMers’ March 21, 2013 message, Byrne -- who identified herself as President of the elected Board of the SEIU 1021/Fremont Chapter a.k.a. FACE -- replied stating that: (1) the vote was not sanctioned or approved by the FACE board; (2) there was no disaffiliation from SEIU; (3) the group that created the vote did not ask the Board to sanction or approve the vote, and did not act within the scope of any bylaws; (4) the vote was not properly conducted; and (5) “[w]e do not accept the results of this election and plan on meeting for negotiations with SEIU 1021 representing us as soon as our election for negotiating team has been completed,” which she said would be as soon as March 21, 2013. As Hernandez and Varacalli had advised the City by letter in December 1978 (see pp. 5-6

above) only the president, here Byrne, was authorized to convey to the City the Board's decision as to the validity of any disaffiliation election.

Also on March 21, 2013, Steele sent a letter to Deputy City Attorneys Margolis and Ancel, stating that the disaffiliation election was illegitimate, reminding the City it had a continuing duty to bargain with SEIU, and asking the City to respond to SEIU's request for bargaining dates as soon as possible.

Later on March 21, 2013, and continuing on March 25, 2013, FACE board members Lydon, Young and Wong replied individually to DeMers, but did not state specifically whether the FACE board recognized the results of the election. Young, however, asserted that there were no internal rules to govern the vote.

On March 22, 2013, Conwright provided a lengthy e-mail message in response to the City's inquiry of the FACE board. In his response Conwright stated that he was not copying SEIU representatives on his reply because the disaffiliation election was internal to FACE only. He accused Byrne of having a "personal commitment to SEIU at the expense of our FACE members." Conwright further asserted that the other three FACE board members (Lydon, Wong, and Young) "in fact sanctioned and supported" the disaffiliation election and participated in various ways, including sending e-mail notifications to bargaining unit members about the dates, times, and locations of the balloting, and observing the ballot count.

In further correspondence with Margolis and Ancel on March 25, 2013, Steele asserted that "FACE" no longer existed as an employee organization, and that for over thirty years "SEIU has been, and continues to be, the exclusive representative of employees in the 'FACE bargaining unit.'" Although the Fremont City Employees' Association filed articles of incorporation in 1959, and was issued a business license, the Secretary of State's website since at least April 2013, has described the Fremont City Employees Association as being in

“suspended” status, and does not list any agent for service of process. (See <http://kepler.sos.ca.gov>.)

On March 27, 2013, Margolis sent Steele a letter, with a copy to “FACE Petitioner” Conwright. Margolis reiterated that the City viewed disaffiliation as an internal matter, and that when the City learned of the disaffiliation election, it contacted the FACE board and asked them to provide official notification of the election results. Margolis further explained that the City had received e-mail replies from each of the Board members stating their individual opinions, but had not received any communication that reflected formal action of the Board, and would not schedule a bargaining session with SEIU until it had “notice of a resolution of the issue.” Margolis added that, “in light of the confusion regarding the status of SEIU as the FACE affiliate, we will continue to collect dues/fees from FACE members but we will be placing them in a separate account until this matter is resolved.”

Also on March 27, 2013, Steele sent a letter to Margolis, expressing “shock and outrage” that the City had delayed bargaining, ceased transmitting dues and fees to SEIU, interfered with the representational choices of the employees in the general bargaining unit, and was engaging in unlawful favoritism towards and direct dealing with Conwright by “tak[ing] his word as truth regarding developments in the [General Bargaining] unit,” despite knowing the “undeniable and verifiable” fact that he was not an elected official and held no leadership position in SEIU or “FACE,” and by “spoon-[feeding] legal advice” to him.

On April 2, 2013, Steele sent a further letter of objection, enclosing a declaration signed by Byrne on March 27, 2013, in which she identified herself as the elected President of the Board for “the SEIU Local 1021 Fremont Chapter,” also known as FACE. In her declaration, Byrne stated under penalty of perjury that: the disaffiliation vote was not sanctioned or approved by the elected board; Conwright did not hold a leadership position with FACE;

FACE had not disaffiliated from SEIU; FACE did not send any observers to the ballot count; members had complained that they did not know about the vote; and FACE did not accept the results of the election. In her letter, Steele renewed SEIU's demand to begin bargaining with the City for a successor MOU, and asked for an acknowledgement of the demand to bargain by April 3, 2013.

The City's Acceptance of the Disaffiliation Election Results and Continuing Refusal to Bargain With or Transmit Dues and Fees to SEIU

On April 3, 2013, DeMers sent the FACE board members a letter to confirm that on April 1, 2013, the City had received a "notice," signed by FACE board members Lydon, Young, and Wong, stating that the signatories accepted and would honor the results of the disaffiliation election. In the notice, the FACE board members also asked the City to act immediately in support of the decision to disaffiliate, including ceasing collection of dues and fees payable to SEIU. The City's April 3, 2013 letter asked FACE to submit names of its bargaining team members and potential bargaining dates. The City further stated that, since SEIU has contested the disaffiliation, dues and fees will be held in a third-party account until the matter is resolved.

On April 11, 2013, the City received an e-mail message from FACE board member Young, attaching a copy of a "recall letter" signed by Lydon, Young, and Wong. In that letter, these three Board members notified Byrne that they had decided to terminate her role as president and remove her from office.

On or about April 12, 2013, Young sent an email message to Margolis, requesting that the City begin bargaining with FACE as soon as April 16, 2013, for a new MOU with an effective date of July 1, 2013.

POSITIONS OF THE PARTIES

SEIU's Position

SEIU contends that the City violated its own rules for a decertification election by accepting a sworn verification by the decertification petitioner outside of the November filing period mandated by the City's EERRR section 9(j). SEIU also alleges that the City unlawfully assisted the decertification petitioner by creating a new theory (disaffiliation) for removing SEIU, and by providing him with legal advice and guiding him through the disaffiliation process when it sent him copies of its correspondence with SEIU attorneys.

SEIU further contends that it remains the exclusive bargaining representative, FACE has ceased to exist as a separate entity and the City has impermissibly withdrawn recognition from, refused to bargain with and withheld union dues and agency fees from SEIU in light of an unsanctioned and repudiated disaffiliation election.

In light of the City's ongoing unfair practices, urges SEIU, an injunction to revert the parties to the status quo ante is necessary in order to protect the rights of SEIU and its members and preserve PERB's remedial authority.

City of Fremont's Position

The City contends that the unfair practice charge is moot because disaffiliation, not decertification, was the proper procedure for FACE to sever ties with SEIU. In any case, contends the City, it acted consistently with the MMBA and its EERRR by accepting Conwright's verification outside of the November decertification period because it was a technical, nonmaterial defect that did not adversely affect the integrity of the decertification process.

The City further contends that FACE always has been and remains the recognized exclusive representative of the general bargaining unit; the disaffiliation election was a strictly

internal union matter and, therefore, SEIU's action is not properly before PERB; and SEIU has no standing to seek an injunction to restore the status quo ante before it was ousted by the FACE membership.

DISCUSSION

Introduction

Injunctive relief is appropriate where the Board concludes that: (1) reasonable cause exists to believe an unfair practice has been committed; and (2) the injunctive relief is just and proper. (*Modesto, supra*, 136 Cal.App.3d 881.) We look first to the purposes and provisions of the MMBA, then whether reasonable cause exists to believe an unfair practice has been committed, and finally whether injunctive relief is just and proper.

The City's Employer-Employee Relations Are Governed by the MMBA

In 1968, the Legislature enacted the MMBA to govern labor relations for local government agencies and their employees. (MMBA, § 3500; *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 (*Coachella*).) The MMBA's stated purposes are to: (1) promote full communication between public employers and employees; and (2) improve personnel management and employer-employee relations. (MMBA, § 3500.) To accomplish these goals, the Legislature enacted a comprehensive statutory scheme that gives employees of local agencies the right to organize and be represented by employee organizations, and requires employers both to meet and confer in good faith with employee representatives on wages, hours and other working conditions, and to endeavor to reach binding agreements on such matters. (MMBA, §§ 3502, 3504.5, 3505; *Coachella*, at p. 1083.)

In particular, MMBA section 3503 vests public employees with the right to form, join and participate in the activities of employee organizations for the purpose of representation on

employment matters, as well as the right to refrain from engaging in those activities. The MMBA makes it unlawful for a public agency to, “[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.” (MMBA, § 3506.5(a).) The MMBA also accords recognized employee organizations the right to represent their members in their employment relations with public agencies (MMBA, § 3503.), and it is unlawful for a public agency to deny these organizations the rights guaranteed to them under the MMBA. (MMBA, § 3506.5(b).) Moreover, the MMBA authorizes the deduction of dues and agency fees from employee pay, to afford exclusive representatives the financial means to carry out their representation duties. (MMBA, § 3508.5.) The MMBA also prohibits public agencies from interfering with the formation and administration of any employee organization, or to encourage employees to join any employee organization in preference to another. (MMBA, § 3506.5(d).) The MBMA further requires governing bodies of local agencies to “meet and confer [with employee representatives] in good faith regarding wages, hours and other terms and conditions of employment.” (MMBA, § 3505.) More specifically, the MMBA makes it unlawful for a public agency to refuse to negotiate in good faith with a recognized employee organization. (MMBA, § 3506.5(c).)

The MMBA also authorizes local agencies to adopt reasonable rules and regulations for the administration of employer-employee relations, including procedures for recognizing employee representatives as the exclusive bargaining agent for units of employees, as well as for decertifying an exclusive representative organization. (MMBA, § 3507.) That section specifically provides, however, that “[n]o public agency shall unreasonably withhold recognition of employee organizations.” (MMBA, § 3507(c).) Moreover, it is an unlawful practice for a public agency to violate its own local rules, or to adopt and enforce local rules

not in conformance with the provisions or purposes of the MMBA. (MMBA, § 3509(b); PERB Reg. 32603(f); *County of Imperial* (2007) PERB Decision No. 1916-M.)

We turn next to whether there is reasonable cause to believe an unfair practice has been committed.

Does Reasonable Cause Exist to Believe that the City Has Committed Unfair Practices?

On the basis of facts developed in the General Counsel's investigation,⁸ we assess whether reasonable cause exists to believe that, as alleged, the City violated the MMBA by: (1) improperly processing Conwright's decertification petition; (2) failing to arrange for a neutral third party to conduct the decertification election; (3) improperly assisting Conwright by providing legal and other advice; (4) refusing to recognize and bargain with SEIU as the exclusive representative of the bargaining unit, and improperly withholding member dues and agency fees that are payable to SEIU pursuant to the current MOU; and (5) violating its duty of neutrality by expressing its support for the entity referred to as FACE, as opposed to SEIU. We review each alleged violation in turn.

1. Does Reasonable Cause Exist to Believe That The City Improperly Processed Conwrights' Decertification Petition, and Refused to Commit to Having a Neutral Third Party Run the Election?

The City's EERRR provides that a decertification petition may be filed only during the month of November in any given year, and requires that such a petition and all accompanying documents be verified under oath. Conwright seemingly filed a decertification petition with an adequate number of signatures on November 29, 2012, within the window period; but the

⁸ To assess the existence of reasonable cause, the Board relies on facts developed in the General Counsel's investigation of the IR Request and supporting unfair practice charge. Those facts are set out above. The ultimate determination of the facts in this case must await the outcome of PERB's administrative procedures, which include a formal hearing conducted in June 2013, on the unfair practice complaint issued by PERB's Office of the General Counsel, the ALJ's proposed decision issued on September 4, 2013, and ultimately a decision by the Board itself in the event either or both parties take exception to the findings of fact or conclusions of law contained in the ALJ's proposed decision.

petition he filed was incomplete because it lacked a verification which was not filed until January 10, 2013. Nevertheless, the City treated the petition as properly filed and commenced to schedule election dates. Thus, we find reasonable cause to believe that the City:

(a) disregarded its own local rules by processing an improperly-filed and incomplete decertification petition; (b) permitted Conwright to supply an essential element of the petition more than a month after the deadline for a timely filing, thereby preferentially treating Conwright and the group he purported to represent, in violation of the City's statutory duty to remain neutral; and (c) interfered with SEIU's right to represent the bargaining unit members and the bargaining unit members' rights to be represented. (MMBA, §§ 3503, 3506, 3506.5(a) and (b), 3509(b); PERB Reg. 32603(a) and (b).)

The City's local rules also provide that it may conduct decertification elections itself. However, by including a "no representation" option on the ballot, the City inserted itself as an "interested party" to the election. SEIU objected to the City's decision to conduct the election itself on this basis, and asked that the City arrange for a neutral third party to do so, but the City refused to commit to such a course of action. Thus, we find reasonable cause to believe that the City violated its duty of strict neutrality, and interfered with SEIU's right to represent the bargaining unit members and the bargaining unit members' rights to be represented.

(MMBA, §§ 3502, 3503, 3506, 3506.5(a) and (b), 3509(b); PERB Reg. 32603(a), (b) and (g).)

2. Does Reasonable Cause Exist to Believe That The City Improperly Assisted Conwright in His Efforts to Oust SEIU?

On February 1, 2013, the City provided Conwright, the "decertification petitioner," with a copy of its letter to SEIU, opining that SEIU was not the recognized exclusive representative and that disaffiliation, not decertification, was the appropriate procedure. The information the City thus provided Conwright did not concern a mere technical deficiency in Conwright's petition (*Golden Gate Bridge Highway & Transportation District* (2004) PERB

Decision No. 1669-M), but rather afforded Conwright legal advice about a different means of accomplishing Conwright's apparent goal, viz., removing SEIU as an affiliate. Thus, instead of simply denying Conwright's decertification petition, the City afforded him legal advice concerning disaffiliation.

Acting apparently on this legal advice, Conwright and several other employees undertook to have a "disaffiliation" election. SEIU alleges numerous irregularities in this election, including who called for the vote, who conducted the voting, who was allowed to vote, and who supervised the voting and the ballot count. SEIU alleges, inter alia, that the disaffiliation election contravened union bylaws, which authorize only union members to vote in internal union elections. (*NLRB v. Financial Inst. Employees* (1986) 475 U.S. 192 [only union members entitled to vote in internal union affiliation and disaffiliation decisions];⁹ *San Jose-Evergreen Community College District* (1990) PERB Order No. Ad-216.)

Additionally, on March 27, 2013, the City again copied Conwright on correspondence to SEIU, in which the City stated that it would not schedule bargaining over a successor MOU until the SEIU/FACE dispute was resolved and that it would cease transmitting dues/fees funds to SEIU. The City's correspondence repeatedly referred to Conwright as the "FACE Petitioner," even though he did not hold any official position with the group.

Based on the foregoing, we find reasonable cause to believe that the City's conduct in providing improper and unlawful assistance to Conwright was in violation of its duty to remain neutral and that such assistance interfered with the rights of SEIU and its bargaining unit employees. (MMBA, §§ 3503, 3506, 3506.5(a) and (b), 3509(b); PERB Reg. 32603(a) and (b).)

⁹ Like California courts, PERB relies on National Labor Relations Board (NLRB) and federal court decisions interpreting the National Labor Relations Act when construing analogous provisions of California's labor relations statutes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 (*Vallejo*).)

3. Does Reasonable Cause Exist to Believe That The City Improperly Withdrew Recognition From SEIU as the Exclusive Representative of the Bargaining Unit, Refused to Bargain with SEIU, and Improperly Withheld Member Dues and Agency Fees Payable to SEIU?

Under the MMBA, the employer's duty to bargain in good faith is owed to the recognized employee organization. (MMBA, § 3505.) The Board has held consistently that where the duty exists, an employer's outright refusal to bargain with a recognized employee organization violates the duty to bargain in good faith. (*Los Angeles Unified School District* (1995) PERB Decision No. 1079; *Modesto, supra*, 136 Cal.App.3d 881, 897, 901; *Small v. Avanti Health Systems, LLP* (9th Cir. 2011) 661 F.3d 1180, 1185, 1191 (*Avanti*).)

On February 1, 2013, the City sent SEIU a letter stating that it had determined that the proper exclusive representative for the bargaining unit was FACE, and not SEIU. Since then, the City has persisted with this position, reasserting in multiple communications to SEIU that the City no longer views SEIU as the exclusive representative of the bargaining unit. The City has withdrawn recognition of SEIU as the exclusive representative, based on a highly irregular "disaffiliation" vote conducted and carried out by Conwright and several other employees who did not hold elected office or other positions of leadership in FACE, and proceeded with the election without seeking or obtaining authority or approval from the FACE board. Thus, we find reasonable cause to believe that by the foregoing conduct the City improperly withdrew recognition from SEIU in violation of the MMBA. (MMBA, §§ 3503, 3505, 3506, 3506.5(a) and (b), 3509(b); PERB Reg. 32603(b) and (c).)

Additionally, on March 27, 2013, the City declined SEIU's repeated requests to bargain for a successor MOU, first interposed by SEIU on March 6, 2013. The City claimed that it did not know whether it should negotiate with SEIU or with FACE, even though it had not received any formal notification from the FACE board of the results of the disaffiliation election. Because of its confusion, claimed the City, it would continue to collect dues and fees

from bargaining unit members, but would place them in a separate account until the identity of the exclusive representative and the validity of the disaffiliation election were resolved by PERB. A week later on April 3, 2013, the City notified the FACE board that it had received the statement from three FACE board members announcing disaffiliation from SEIU. The April 3, 2013, letter asked FACE to provide the City with bargaining dates for successor agreement negotiations and the names of FACE bargaining team members. As of April 3, 2013, therefore, the City clearly had announced its intent not only to cease bargaining with SEIU, but also to cease transmitting the dues and agency fees SEIU was entitled to receive pursuant to the current MOU as exclusive representative, and which SEIU had been receiving up to that point. The City appears to have based its decisions to withdraw recognition from SEIU, refuse to bargain with SEIU, recognize and invite bargaining with FACE instead of SEIU, and cease transmitting dues and fees pursuant to the MOU to SEIU, on the “disaffiliation” vote undertaken by Conwright under highly irregular procedures.

We find reasonable cause to believe that by the foregoing conduct the City violated the MMBA by refusing to bargain with, and refusing to transmit dues and fees payable to, SEIU. (MMBA, §§ 3503, 3506, 3506.5(a) and (c), 3507(c), 3509(b); PERB Reg. 32603(a), (b), (c) and (d).)

4. Does Reasonable Cause Exist to Believe That The City Improperly Expressed Support for One Organization over Another, and Thereby Breached A Duty of Strict Neutrality?

Under the MMBA, where two employee organizations are competing for the right to represent the same employees, the employer must remain neutral. (*County of Monterey* (2004) PERB Decision No. 1663-M (*Monterey*).) If an employer does not maintain neutrality, the employer is deemed to encourage employees to prefer one organization over another, which violates the employees’ right to choose an organization free of employer interference. (MMBA, § 3506.5(d); PERB Reg. 32603(d).) In assessing such conduct, the Board asks

whether the employer's conduct tends to influence employee free choice of organization.

(*Monterey*.) We conclude on the facts here there is reasonable cause to believe that it does.

The City's communications with the FACE board, and its assertion that SEIU is not – and never has been -- the recognized exclusive representative, despite more than thirty (30) years of representation by SEIU and its predecessors in interest, state a clear preference for FACE over SEIU.

We find reasonable cause to believe that the City violated the MMBA by expressing support for FACE over SEIU. (MMBA, §§ 3502, 3503, 3506, 3506.5(d), 3509(b); PERB Reg. 32603(a), (b) and (d).)

We turn next to whether injunctive relief is just and proper.

Is Injunctive Relief Just And Proper?

Under *Modesto, supra*, 136 Cal.App.3d 881, the “just and proper” standard is met “[w]here there exists a probability that the purposes of the [MMBA] will be frustrated unless temporary relief is granted or the circumstances of a case create a reasonable apprehension that the efficacy of the [Board's] final order may be nullified, or the administrative procedures will be rendered meaningless.” (*Modesto*, at p. 902, internal brackets and quotations omitted.)

1. Absent Injunctive Relief Would The MMBA's Purposes Be Frustrated?

The purposes of the MMBA are promoting full communication between public employers and employees and improving personnel management and employer-employee relations by recognizing the right of public employees to join organizations of their own choice and to be represented by these organizations in their employment relationship with public agencies. (MMBA, § 3500.) To achieve these purposes, in 1968¹⁰ the Legislature established

¹⁰ In 2001, the Legislature granted PERB exclusive initial jurisdiction over charges of unfair practices arising under the MMBA.

in the MMBA a system of collective bargaining and conferred on employees, employers and employee organizations particular rights and duties. Among those rights and duties are the right of employees to select their representative free of employer interference, and the right of the selected representative to engage the employer in collective negotiations over wages, hours and employment terms and conditions.

The City's alleged conduct, to wit, improperly processing a decertification petition and favoring one organization over another, interferes directly with MMBA rights of employees to choose their exclusive representative. Moreover, the City's other alleged conduct, to wit, improperly withdrawing recognition from SEIU, and withholding organizational dues and fees transmittals to SEIU, interferes directly with MMBA rights and benefits of an employee organization. The withdrawal of recognition effectively precludes the exclusive representative from performing at all its representation functions. Thus, the alleged City conduct strikes at the heart of the MMBA's collective bargaining regime by preventing the employees' chosen representative from working on their behalf.

Further, the City's alleged conduct causes great harm to SEIU as exclusive representative of the bargaining unit. The City's alleged conduct precludes SEIU from performing any of its duties as exclusive representative. Thus hobbled, SEIU may neither negotiate for a successor to its current MOU, nor represent bargaining unit employees in grievances, disciplinary proceedings or arbitrations. In these circumstances, the MMBA's system of collective negotiations is simply inoperable, frustrating the MMBA's twin purposes of improving employer-employee relations and increasing communication with employees.

We conclude that injunctive relief is appropriate and necessary in this case to prevent frustration of the purposes of the MMBA.¹¹

2. Absent Injunctive Relief Would The Efficacy of A Board Final Order Be Nullified?

An employer's failure or refusal to bargain is likely to irreparably injure union representation. (*Avanti, supra*, 661 F.3d 1180, 1191, quoting *Frankl v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334, 1362 (*Frankl*).) The Board's traditional make-whole remedies do not match the full range of harms flowing from the violation. (*Avanti*, at p. 1191, quoting *Frankl*, at p. 1365.) We explain.

A refusal to bargain, implicit in an employer's withdrawal of recognition, gives rise to myriad harms. (*Avanti, supra*, 661 F.3d 1180, pp. 1191-1193.) Absent bargaining, there will be no negotiated agreement or MOU. Employees are thus denied the opportunity to achieve economic and non-economic benefits which a negotiated agreement might contain. Such harm is irreparable, since the Board's traditional make whole authority does not extend to economic or non-economic benefits that might have been obtained had the employer recognized and negotiated an MOU with the employees' representative. Moreover, even if such make whole relief could be awarded, the employees would be less than whole since the "right to enjoy the benefits of union representation is immeasurable in dollar terms once it is delayed or lost." (*Avanti*, at p. 1192.)

Such harm is foreseeable here. The City has invited FACE, not SEIU, to commence negotiating a successor MOU. SEIU negotiated the current MOU and has represented unit

¹¹ Under *Vallejo, supra*, 12 Cal.3d 608, PERB relies on NLRB precedent when construing the MMBA. The NLRB recognizes the following employer conduct as sufficiently damaging to the interests of employees and their organizations to merit injunctive relief: (1) withdrawal of recognition from an incumbent union; (2) recognition or assistance to minority union; and (3) outright refusal to bargain a successor agreement. (NLRB Office of the General Counsel (September 2002) § 10(j) Manual User's Guide, at pp. 5-8, and authorities discussed therein.)

employees over several decades. If, after adjudicating the underlying charge, the Board concludes that the City wrongly withdrew recognition from, and should have negotiated with, SEIU, the probable remedial order would specify that the parties return to the status quo preceding the City's withdrawal of SEIU recognition, to wit, recognizing and negotiating with SEIU. However, the Board would be unable provide the unit employees a remedy which compensates them for the delay in economic or non-economic benefits the employees might have received were the City negotiating now with SEIU for a successor MOU.

Additionally, to the extent the City concludes a successor MOU with FACE instead of SEIU, a remedial order requiring the City to restore the status quo ante would arguably require the parties to "unwind" an MOU negotiated in the interim with FACE. Such a process would be highly problematic, involving a speculative effort to determine whether and how an MOU negotiated by SEIU might have been more or less beneficial to employees than an MOU negotiated by FACE.

Moreover, non-economic benefits of representation include not just negotiation of non-salary MOU provisions such as discipline, transfer and reassignment. Benefits of organization representation include as well the representation of individual employees or groups of employees in grievances, disciplinary matters, and or arbitration. Harm to employees arising from a grievance, arbitration or disciplinary proceeding, in which they are denied effective representation by an exclusive representative, could not be rectified through a make whole remedial order to restore the status quo ante.

Finally, the efficacy of the Board's final order is likewise nullified by the necessary delay accompanying PERB's administrative procedures, during which an unjustly ousted union suffers loss of support. By denying SEIU the opportunity to bargain on its unit members' behalf, SEIU is precluded from demonstrating its value to unit employees. "As time passes,

the benefits of [representation] are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable.” (*Avanti, supra*, 661 F.3d 1180, 1192.)

We conclude that injunctive relief is appropriate and necessary in this case to preserve the status quo ante and thereby prevent nullification of a Board final order owing to the lapse of time required to complete the Board’s administrative procedures.

3. Absent Injunctive Relief Would The Board’s Administrative Procedures Be Rendered Meaningless?

PERB’s function under MMBA is to exercise its exclusive initial jurisdiction to interpret and administer the statute, including the determination of whether an unfair practice charge is justified and, if so, what remedies are most appropriate to effectuate the purposes of the MMBA. (MMBA, § 3509(b); *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-606 (*San Jose*).) PERB determines in the first instance whether a party’s conduct constitutes a failure to bargain in good faith. (*San Jose*, at p. 606; *San Diego Teachers Assn. v Superior Court* (1979) 24 Cal.3d 1, 12-14.)

PERB’s role as the expert agency charged with administering the MMBA is to initiate and conduct administrative proceedings to determine whether an unfair practice has occurred and what remedy, if any, is appropriate. In so doing, PERB must conduct hearings in order to develop a sufficient factual record to: (1) allow the Board to resolve in a final decision any dispute as to an alleged violation of the MMBA; and (2) allow for meaningful judicial review of a final Board decision.

Absent temporary relief to restore and maintain the status quo ante, PERB’s task of adjudicating and remedying alleged unfair practices is in severe jeopardy. As alleged, the City has already withdrawn recognition of SEIU, has recognized FACE in lieu of SEIU as the exclusive representative of employees, and has invited negotiations with FACE over a

successor MOU. To protect PERB's jurisdiction and the availability of PERB's customary cease and desist and make whole remedies, temporary relief is necessary to restrain the City from changing the status quo in a fashion that outstrips the capacity of PERB to afford appropriate relief.

We conclude that injunctive relief is appropriate and necessary in this case to prevent the Board's procedures becoming meaningless through inability to provide a meaningful remedy.

ORDER

Based on the foregoing, the Board hereby GRANTS the request to seek injunctive relief in Case No. SF-CE-1028-M.

Chair Martinez and Members Winslow and Banks joined in this Decision.